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FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1511

LARRY DICKINSON AND GIBBS ADAMS, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF AMICUS CURIAE, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

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PRELIMINARY STATEMENT

The American Newspaper Publishers Association files this brief as amicus curiae, respectfully urging that this Court issue a Writ of Certiorari to review the final decision of the United States Court of Appeals for the Fifth Circuit, entered in this case on April 9, 1973. That decision, which was predicated upon the

court's earlier decision in the same case entered on August 22, 1972, affirmed the judgment of the United States District Court for the Middle District of Louisiana entered on October 10, 1972, which convicted the Petitioners of criminal contempt for violating an order of the District Court. The letters of the Petitioners and the Solicitor General stating their consents to the filing of this amicus curiae brief are set forth in Appendices A and B hereof.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter called "ANPA" or "Association") is a non-profit, membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,050 daily and Sunday newspapers, representing over ninety percent of the total daily and Sunday circulation of newspapers in the United States. The Baton Rouge, Louisiana newspapers for whom the Petitioners in this case were reporting, *The Morning Advocate* and *The State Times,* are members of the ANPA. The Association concerns itself with matters of general significance to the daily newspaper publishing business and to the profession of journalism. In that regard, the ANPA acts as a clearing house of information for its members by disseminating bulletins and research reports on all significant phases and developments of the newspaper business. Frequently, ANPA has taken positions on public matters which affect the interests of its members.

In the present case, the Association desires to present its views with regard to the necessity for this Court to review the question of whether the Petitioners were

justifiably convicted of criminal contempt for reporting about a hearing which took place in open court.

ANPA submits that if the Fifth Circuit Court of Appeals' decision in this case is left undisturbed, there will be a conflict between the law as interpreted by the Fifth Circuit Court of Appeals and the decisions of this Court as well as a conflict between the law as interpreted by the Fifth Circuit Court of Appeals and the law as interpreted by the Seventh Circuit Court of Appeals. ANPA has a particular interest in this matter because until this conflict is resolved, reporters who are improperly ordered to refrain from reporting the facts of open-court proceedings must risk a criminal contempt conviction in order to fulfill their role of providing timely news to the public about matters which the public is undisputedly entitled to receive. This situation will significantly curtail the freedom of the press to the detriment of the public. Of course, ANPA is primarily interested in urging this Court to reverse the decision below, thereby affirmatively establishing that a patently invalid order, or an invalid order based upon a rule of court, restraining the freedom of the press may be violated without criminal sanctions.

For this reason, your amicus desires to present to this Court, for its assistance, the views of ANPA in regard to the important issues raised by this proceeding.

ARGUMENT

The Association fully supports and adopts the arguments contained in the Petition for a Writ of Certiorari, except the Association wishes to emphasize that this case does not require the Court to review the narrow question of whether members of the press

should be treated differently than other citizens with regard to the circumstances under which the validity of a court order may be challenged as a defense to a criminal contempt conviction for violation of that order. As discussed below, the Court should decide this case by a determination that the order issued by the district court was patently invalid or alternatively by adoption of the principle of law set forth by the Court of Appeals for the Seventh Circuit in *In Re Oliver*, 452 F.2d 111 (7th Cir. 1971), which permits one to collaterally attack the validity of a rule of court, as distinguished from a collateral attack upon an order issued pursuant to an adjudication between contending parties.

The District Court's Order Was Patently Invalid and the Affirmance of the Contempt Judgments Therefore Was Not in Accordance with the Decisions of This Court

In *Walker* v. *Birmingham*, 388 U.S. 307, 315 (1967), this Court noted by implication that a person may violate a court injunction which is "transparently invalid" or displays "only a frivolous pretense to validity," and then raise the invalidity of the injunction on the appeal of a contempt conviction for violating the injunction. The original decision of the Fifth Circuit in this case interpreted *Walker* in that manner:

> Absent a showing of "transparent invalidity" or patent frivolity surrounding the order, *it must be obeyed . . . United States* v. *Dickinson*, 465 F.2d 496, 509 (5th Cir. 1972) (Printed in Appendix A of Petitioners' Brief)

It is evident that the order at issue in this case was patently invalid. This is amply demonstrated by the initial opinion of the Fifth Circuit in this case, *United*

States v. *Dickinson*, 465 F.2d 496 (5th Cir. 1972) in which Chief Judge Brown thoroughly analyzed the history of the free press-fair trial issue and set forth the reasons for the clear lack of precedence for and the clear inappropriateness of the district court's order. The opinion states the following conclusion:

> [o]ne significant circumstance is *readily apparent* —no decision, opinion, report or other authoritative proposal has ever sanctioned by holding, hint, dictum, recommendation or otherwise any judicial prohibition of the right of the press to publish accurately reports of proceedings which transpire in open court . . . (emphasis added)
>
> * * * * * * * * *
>
> Even if special exigencies might justify curtailment of the right to publish court proceedings in some extraordinary circumstance—and that *if* is a very big one indeed—the present case is peculiarly ill-suited for abandonment of the traditional reluctance of courts to supervise the content of news accounts of public proceedings. 465 F.2d at 507.

Despite the circuit court's firm conclusion as to the "readily apparent" invalidity of the district court's order, the court did not find that the order was "patently invalid" so as to distinguish this case from the holding in *Walker* v. *Birmingham*, *supra*. The court seemed to be satisfied that the order was not frivilous, referring to the "conscientious" trial judge who "earnestly pursued" the "legitimate objective" of preservation of an impartial jury within the community for the anticipated state criminal prosecution. 465 F.2d at 500. However, under the *Walker* test it is not sufficient that the judge issuing an order has a subjective legitimate intent. If a court order is

determined to be patently invalid by an objective determination of legal authority, then a contempt conviction for violating the order cannot stand.

When the district court judge ordered the media to restrain from reporting the proceedings which they observed, the judge did not restrict "the small handful of spectators" present in the courtroom from telling anyone and everyone what they heard and observed. See Petitioners' Brief at Appendix F.4. This circumstance, not discussed by the court of appeals, dramatically illustrates the patent invalidity of the district court order. The court order restrained the press from publishing information which citizens of the community were permitted to discuss without limitation. Would not those citizens who were unaware of the court's order be suspicious of the press if they thought that the press voluntarily declined to report about court proceedings relating to a charge that elected state officials had pressed charges against a civil rights worker for the sole purpose of harrassment? The district court order was therefore patently invalid if only for the reason that it subordinated freedom of the press to freedom of speech.

The Decision Below Conflicts With a Decision of the United States Court of Appeals for the Seventh Circuit

Even if this Court finds that the order at issue in this case was not patently invalid and, therefore, the contempt conviction is not in conflict with *Walker* v. *Birmingham, supra,* the decision of the fifth circuit is directly contrary to a decision of the Court of Appeals for the Seventh Circuit, *In Re Oliver,* 452 F.2d 111 (7th Cir. 1971). The seventh circuit reversed a citation issued to an attorney by the District Court

for the Northern District of Illinois which reprimanded the attorney for out of court public statements violating a Policy Statement issued by the District Court. The court of appeals held that the rule of court violated by the attorney was invalid under the First Amendment and the attorney was entitled to challenge the validity of the rule in an effort to reverse the citation. The court determined that *Walker v. Birmingham, supra,* was not controlling for the following reason:

> [t]here is a fundamental distinction between the functions of a court in its usual adjudicative role, in which it is restricted to determining relative rights between parties clearly subject to its jurisdiction based upon facts then made known to the court, and the function of a court in an essentially legislative role, in which it adopts broad rules, perhaps having their greatest effect on parties not before it, based on facts largely anticipated. In this latter function courts should be treated more like legislatures than courts in that their rule-making decisions should be subject to the same sorts of challenges permitted for statutes. As one who has violated a statute and is prosecuted for such violation may challenge the validity of the statute, so should one who has violated a rule of court be permitted to challenge the validity of the rule itself. 452 F.2d at 113-114.

The order issued by the district court in this case, preventing the media from publishing the details of a hearing before the court, was not in conjunction with the court's adjudicative role, but was in conjunction with the court's rule-making or legislative role. The order was based upon the district court judge's improper application of the broad Free Press-Fair Trial rules promulgated by the district court, having

its greatest effect on parties not before the court. The order was not based upon facts known to the court, but rather was based upon the anticipation that the jurors of a possible state criminal trial might be prejudiced by published accounts of the hearing before the Federal court.

This Court should review the decision of the fifth circuit in order to resolve the conflict on this issue between that court and the Court of Appeals for the Seventh Circuit. Reporters relying upon the rationale set forth in *In Re Oliver, supra*, should not be subject to the risk of contempt convictions for failing to comply with invalid court orders issued pursuant to a rule of court. Such a situation involves a significant obstruction to a free press.

CONCLUSION

For the foregoing reasons the American Newspaper Publishers Association strongly urges the Court to grant the Petition for a Writ of Certiorari filed herein.

Respectfully submitted,

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